UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AUTOMOBILE CLUB OF NEW YORK, INC., d/b/a "AAA New York" and "AAA New Jersey, Inc.",	:	
Plaintiffs,	:	11 Civ. 6746 (RKE)(HBP)
-against-	:	OPINION AND ORDER
THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,	:	
Defendant.	:	

PITMAN, United States Magistrate Judge:

I. Introduction

By notice of motion dated August 6, 2013 (Docket Item 91), Automobile Club of New York, Inc., doing business as "AAA New York" and "AAA New Jersey" (collectively "AAA") move to compel the production of documents withheld by the Port Authority of New York and New Jersey (the "Port Authority") pursuant to the deliberative process privilege. For the reasons set forth below, AAA's motion is denied.

II. Facts

A. Relevant Factual and Procedural Background

The facts and allegations in this action are set forth in the decision of the Honorable Richard J. Holwell, United States District Judge (retired), addressing AAA's motion for a preliminary injunction and defendant's cross motion to dismiss, Auto Club of N.Y., Inc. v. Port Auth. of N.Y. & N.J., 842 F. Supp. 2d 672 (S.D.N.Y. 2012), and my prior Opinion and Order, Auto Club of N.Y., Inc. v. Port Auth. of N.Y. & N.J., 297 F.R.D. 55 (S.D.N.Y. 2013), and may be briefly summarized.

AAA alleges that the Port Authority approved certain toll increases in the Port Authority's Integrated Transportation Network ("ITN") in order to fund, among other things, real estate development at the World Trade Center site (Complaint, dated Sept. 27, 2007, (Docket Item 1) ("Compl.") ¶¶ 34-45). AAA contends that these toll increases violate the dormant Commerce Clause because they were enacted to fund projects outside the ITN Network, and, therefore, (1) do not represent a fair approximation of the use of ITN facilities and (2) are excessive in relation to the benefits conferred to toll payers (Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunc-

tion, dated Sept. 26, 2011, (Docket Item 32) ("Pls.' P.I. Mem.") at 10). AAA also contends that the toll increases violate the Surface Transportation and Uniform Relocation Act of 1987 (the "Highway Act"), 33 U.S.C. § 508, because they are not "just and reasonable" (Pls.' P.I. Mem. at 6-7). AAA sought a preliminary injunction to reverse the toll increases, and continues to seek declaratory and injunctive relief (Compl. ¶¶ 46-51).

Judge Holwell denied AAA's motion for a preliminary injunction and converted the Port Authority's cross-motion to dismiss into a motion for summary judgment, reserving decision on the cross-motion pending the completion of relevant discovery. Auto. Club of N.Y., Inc. v. Port Auth. of N.Y. & N.J., supra, 842 F. Supp. 2d at 681. Judge Holwell's decision confined discovery to "financial documents or correspondence not yet provided for public review." Auto. Club of N.Y., Inc. v. Port Auth. of N.Y. & N.J., supra, 842 F. Supp. 2d at 61. Several subsequent orders limited discovery to ITN "revenues and expenses for the years 2007 forward" and "the reasons for the toll increases" (Docket Items 41 & 69).

Pursuant to Fed.R.Civ.P. 26 and Local Civil Rule 26.2(c), the Port Authority provided AAA with a privilege log that identified withheld documents on a categorical basis (Ex. B to the Declaration of Kevin P. Mulry, Esq., dated Aug. 6, 2013,

(Docket Item 92) ("Mulry Decl.")). Among other things, the privilege log defined eight categories of documents -- 17, 18, 19, 20, 24, 25, 26, and 27 -- over which the Port Authority claimed the deliberative process privilege and listed for each category the "Date," "Doc Type," "Authors," "Recipients," "Privilege Description" and "Privilege Reason" (Ex. B to Mulry Decl.).

AAA subsequently moved for an Order directing that the Port Authority supplement its privilege log. AAA contended that the privilege log did not provide sufficient detail in the "Privilege Description," "Date," "Authors," and "Recipients" columns and defined the term "Client" too broadly (Letter from Kevin P. Mulry, Esq., dated Feb. 27, 2013, at 2-3).

In a Memorandum Opinion and Order dated May 8, 2013 ("May 8 Order"), I granted AAA's motion in part. In that Order, I concluded that certain aspects of the privilege log provided sufficient detail, while other aspects needed to be supplemented. For example, with respect to "Privilege Descriptions" in the Port Authority's privilege log, I concluded:

> These descriptions provide an adequate basis for AAA to evaluate the Port Authority's assertion of the deliberative process privilege. The descriptions state that these documents reflected the personal opinions of their authors, rather than the stated policy of the agency. Moreover, the descriptions go beyond a generic recitation of the elements of the deliberative process privilege. They specifically identify the decision -- the 2011 proposed toll and fare increases -- and pro-

> vide an overview of the opinions, options and recommendations that the Port Authority evaluated. This information is relevant in assessing whether the documents were created as part of the process by which the Port Authority makes decisions. While I express no opinion on whether the Port Authority has properly asserted the deliberative process privilege, I do find that the description of the documents' contents is sufficiently detailed.

Auto. Club of N.Y., Inc. v. Port Auth. of N.Y. & N.J., supra, 297 F.R.D. at 61. However, with respect to the Port Authority's use of the word "Client" in its privilege log, I found:

> As defined by the Port Authority, "[t]he term 'Client' means and refers to the Port Authority, its employees, commissioners, and/or individuals at the New York or New Jersey governors' offices in the course of their duties to oversee the Port Authority." This definition essentially sweeps in all employees of the Port Authority, without distinguishing the role that a particular author or recipient of a withheld document played at the Port Authority.
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> Accordingly, the Port Authority is directed to supplement its index by providing the number of individuals that comprise the "Authors" and "Recipients" of each of the eight challenged categories. If there are ten or fewer individuals, the Port Authority is directed to specifically identify these individuals. This limited supplementation is appropriate given that the purpose of categorical privilege logs, as detailed above, is to reduce the potential burdens imposed by a document-by-document privilege log in cases involving high volumes of privileged material. If there are only a relatively small number of individuals encompassed within the term "Client" as it is used in each of the challenged categories, the risk of burdensomeness is low and the efficiencies associated with a categorical log are not as compelling. If there are more than ten individual "Authors" or "Recipients" in any category,

> the Port Authority is to identify, by name and title, the most highly placed individual and the least highly placed individual with respect to each category.

Auto. Club of N.Y., Inc. v. Port Auth. of N.Y. & N.J., supra, 297 F.R.D. at 62-64.

Pursuant to my May 8 Order, the Port Authority submitted a revised privilege log accompanied by the declaration of Patrick J. Foye, Executive Director of the Port Authority, setting forth the factual basis for the agency's assertion of the privilege (Ex. A & C to Mulry Decl.).

B. The Instant Dispute

AAA now seeks an Order compelling the production of the 339 documents the Port Authority continues to withhold pursuant to the deliberative process privilege (Docket Item 91). AAA claims that the privilege has not been invoked by the appropriate officials and that the privilege log provides insufficient information to assess the assertions of the privilege. In the alternative, AAA claims that, on balance, its need for the underlying information outweighs the Port Authority's interest in keeping its internal deliberations confidential (Plaintiffs' Memorandum of Law in Support of Motion to Compel, dated Aug. 6, 2013, (Docket Item 93) ("Pls.' Mem.")).

III. Analysis

A. Applicable Law

1. The Deliberative Process Privilege[1]

The deliberative process privilege was comprehensively described by the Honorable Richard J. Sullivan, United States District Judge, in MacNamara v. City of New York, supra, 249 F.R.D. at 77-78:

> "The deliberative process privilege is designed to promote the quality of agency decisions by preserving and encouraging candid discussion between officials. It is based on 'the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news.'" Nat'l Council of La Raza v. Dep't of Justice, 411 F.3d 350, 356 (2d Cir. 2005) (quoting Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8-9, 121 S.Ct. 1060, 149 L.Ed.2d 87 (2001)). An "inter- or intra-agency document" may be subject to the privilege if it is both (1) "predecisional" and (2) "deliberative." La Raza, 411 F.3d at 356 (quoting Grand Cent. P'ship, Inc. v. Cuomo, 166 F.3d 473, 482 (2d Cir. 1999)) (additional internal citations omitted).

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[1]The deliberative process privilege often arises in actions where a party seeks documents from the federal government under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(5). However, the privilege as codified by FOIA is still applied like a common-law privilege. See, e.g., In re Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997). "Thus, in addressing the privilege, district courts in this Circuit and elsewhere frequently rely on authority applying the privilege in both FOIA and non-FOIA actions." See, e.g., McNamara v. City of New York, 249 F.R.D. 70, 77 n.6 (S.D.N.Y. 2008) (Sullivan, D.J.) (collecting cases).

A document is predecisional "when it is prepared in order to assist an agency decisionmaker in arriving at his decision." Tigue v. United States Dep't of Justice, 312 F.3d 70, 80 (2d Cir. 2002). The Second Circuit has noted some factors to consider in determining whether a document is "predecisional," including whether the organization asserting the privilege can (1) "pinpoint the specific . . . decision to which the document correlates" and (2) "verify that the document precedes, in temporal sequence, the 'decision' to which it relates." Grand Cent. P'ship, 166 F.3d at 482 (quoting Providence Journal Co. v. United States Dep't of the Army, 981 F.2d 552, 557 (1st Cir. 1992)).

A document is deliberative when it is "actually . . . related to the process by which policies are formulated." Grand Cent. P'ship, 166 F.3d at 482 (citing Hopkins, 929 F.2d at 84) (additional citation and internal quotation marks omitted). In other words, "the privilege does not protect a document which is merely peripheral to actual policy formation; the record must bear on the formulation or exercise of policy-oriented judgment." Tigue, 312 F.3d at 80 (internal quotation marks and citation omitted). Thus, the privilege "focus[es] on documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" Grand Cent. P'ship, 166 F.3d at 482 (quoting Hopkins, 929 F.2d at 84-85) (additional internal quotation marks and citation omitted). In particular, it is well-settled that "[d]raft documents, by their very nature, are typically predecisional and deliberative. They reflect only the tentative view of their authors; views that might be altered or rejected upon further deliberation either by their authors or by superiors." Exxon Corp. v. Dep't of Energy, 585 F. Supp. 690, 698 (D.D.C. 1983) (internal quotation marks and citation omitted); see also Nat'l Council of La Raza v. Dep't of Justice, 339 F. Supp. 2d 572, 573 (S.D.N.Y. 2004) ("Drafts and comments on documents are quintessentially predecisional and deliberative.").

Nevertheless, a document is not "deliberative" where it concerns "purely factual" information regard-

> ing, for example, investigative matters or factual observations. See Grand Cent. P'ship, 166 F.3d at 482; Hopkins v. U.S. Dep't of Hous. and Urban Dev., 929 F.2d 81, 85 (2d Cir. 1991). "Thus, factual findings and conclusions, as opposed to opinions and recommendations, are not protected." E.B. v. New York City Bd. Of Educ., 233 F.R.D. 289, 292 (E.D.N.Y. 2005) (internal quotation marks and citation omitted).

(internal footnote omitted).

Importantly, "[t]he Supreme Court has held that materials are not to be withheld on the basis of the deliberative process privilege simply because the agency deems them confidential and would prefer not to disclose them." Toney-Dick v. Doar, 12 Civ. 9162 (KBF), 2013 WL 5549921 at *2 (S.D.N.Y. Oct. 3, 2013) (Forrest, D.J.), citing Tigue v. U.S. Dep't of Justice, supra, 312 F.3d at 77. "The deliberative process privilege does not provide a blanket basis upon which to withhold documents that an agency has created during its decision-making process." Toney-Dick v. Doar, supra, 2013 WL 5549921 at *1. "Indeed, if that were the case, the deliberative process privilege would provide an exemption from the discovery rules for decision-making agencies generally -- and that, of course, is not the law." Toney-Dick v. Doar, supra, 2013 WL 5549921 at *1.

Several procedural requirements must be met in order to properly invoke the privilege. First, the privilege must be invoked "by the head of the governmental agency which has control

over the information to be protected, after personal review of the documents in question" or by a subordinate designee of high authority. Reino De Espana v. Am. Bureau of Shipping, 03 Civ. 3573 (LTS)(RLE), 2005 WL 1813017 at *12 (S.D.N.Y. Aug. 1, 2005) (Ellis, M.J.), quoting Flaherty v. Giambra, No. 02-CV-0243E (SR), 2004 WL 816906 at *1 (W.D.N.Y. Jan. 27, 2004); accord In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 643 F. Supp. 2d. 439, 443 (S.D.N.Y. 2009) (Scheindlin, D.J.); In re Grand Jury Subpoena Dated August 9, 2000, 218 F. Supp. 2d 544, 552-53 (S.D.N.Y. 2002) (Chin, D.J.). Second, "the person asserting the privilege must have personally reviewed the purported privileged matter" and "provide[d] specific reasons for the assertion of the . . . privilege with an affidavit contemporaneous with the assertion of such privilege." Martin v. N.Y.C. Transit Auth., 148 F.R.D. 56, 59-60 (E.D.N.Y. 1993); Resolution Trust Corp. v. Diamond, 137 F.R.D. 634, 641 (S.D.N.Y. 1991) (Carter, D.J.). These requirements "rest[] on the notion that the decisionmaker is in the best position to know what documents were prepared to assist a decision, what documents express deliberative opinions, and what documents must be protected in order to maintain internal candor." In re MTBE Prods. Liab. Litig., supra, 643 F. Supp. 2d. at 443.

2. The Requirement of an Index of Documents Withheld on the Ground of Privilege

Federal Rule of Civil Procedure 26(b)(5)[2] and Local Civil Rule 26.2[3] both require that a party withholding documents

[2]Fed.R.Civ.P. 26(b)(5)(a) provides:

> When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial preparation material, the party must:
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> (i) expressly make the claim; and
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> (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed -- and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

[3]Local Civil Rule 26.2 provides:

> (a) Unless otherwise agreed by the parties or directed by the Court, where a claim of privilege is asserted in objecting to any means of discovery or disclosure . . . and an answer is not provided on the basis of such assertion,
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> (1) the person asserting the privilege shall identify the nature of the privilege (including work product) which is being claimed and, if the privilege is governed by state law, indicate the state's privilege rule being invoked; and
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> (2) the following information shall be provided in the objection . . . unless divulgence of such information would cause disclosure of the allegedly privileged information:

(continued...)

on the basis of a privilege prepare an index of the withheld documents. Local Civil Rule 26.2 also authorizes the use of a categorical privilege log, providing that "when asserting privilege on the same basis with respect to multiple documents, it is presumptively proper to provide the information required by this rule by group or category." Although the Local Civil Rule does not define what information must be included in a categorical privilege log, Fed.R.Civ.P. 26 applies with the same force to a categorical log as it does to a traditional log that lists each document individually. Accordingly, a categorical privilege log is adequate if it provides information about the nature of the withheld documents sufficient to enable the receiving party to make an intelligent determination about the validity of the assertion of the privilege. See In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 274 F.R.D. 106, 112 (S.D.N.Y. 2011) (Scheindlin, D.J.) ("The standard for testing the adequacy of the privilege log is whether, as to each document, it sets

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[3](...continued)

> (A) For documents: (i) the type of document, e.g., letter or memorandum; (ii) the general subject matter of the document; (iii) the date of the document; and (iv) the author of the document, the addressees of the document, and any other recipients, and, where not apparent, the relationship of the author, addressees, and recipients to each other. . . .

forth specific facts that, if credited, would suffice to establish each element of the privilege or immunity that is claimed." (internal footnote and quotation marks omitted)); City of New York v. Grp. Health, Inc., 06 Civ. 13122 (RJS)(RLE), 2008 WL 4547199 at *3 (S.D.N.Y. Oct. 10, 2008) (Ellis, M.J.) ("Litigants seeking to invoke the deliberative process privilege must, among other things, identify and describe the information or documents sought, and provide 'precise and certain' reasons for asserting confidentiality over the requested information." (internal citation omitted)); Orbit One Commc'ns, Inc. v. Numerex Corp., 255 F.R.D. 98, 109 (S.D.N.Y. 2008) (Francis, M.J.) ("Lowenstein must justify its assertion of privilege with regard to each category, and the description of each category must provide sufficient information for Numerex to assess any potential objections to the assertions of attorney-client privilege.").

Where a properly prepared index of withheld documents has been served, the withholding party's obligation to produce evidence to sustain its assertions of privilege should be limited to those elements of the privilege or protection challenged by the adversary. 8 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 2016.1 at 318 n.1 (3d ed. 2010), citing S.E.C. v. Beacon Hill Asset Mgmt. LLC, 231 F.R.D. 134, 140 (S.D.N.Y. 2004); ECDC Envtl., L.C. v. N.Y. Marine

& Gen. Ins. Co., 96 Civ. 6033 (BSJ)(HBP), 1998 WL 614478 at *3-*4 (S.D.N.Y. June 4, 1998). As the party asserting privilege, defendants have the burden of establishing through its privilege log, affidavits, or other evidentiary material that the elements of the privilege exist. See Johnson Matthey, Inc. v. Research Corp., 01 Civ. 8115 (MBM)(FM), 2002 WL 31235717 at *3 (S.D.N.Y. Oct. 3, 2002) (Maas, M.J.) ("[W]here the information in the log is insufficient to establish a factual basis for the privilege, the proponent of the privilege bears the burden of showing its applicability, a gap which often is filled through an affidavit or deposition testimony.").

B. AAA's Specific Challenges

1. Invocation of the Privilege

Submitted with the Port Authority's revised privilege log is the declaration of Patrick Foye, the Executive Director for the Port Authority. Foye's declaration states that he has reviewed the 339 documents withheld pursuant to the deliberative process privilege and has found them to be predecisional and deliberative (Ex. C to Mulry Decl. at ¶¶ 1-4). AAA contends that an unspecified number of the 339 documents are communications between the Port Authority and individuals in the New York and

New Jersey Governors' offices ("Inter-Agency Communications"), and that Foye's declaration is insufficient to invoke the deliberative process privilege as to those documents. AAA claims that in order to sustain its claim of privilege, the Port Authority must also submit an affidavit or declaration from the heads of both the New York and New Jersey Governors' offices with respect to the Inter-Agency Communications. AAA claims that the Port Authority's failure to do so constitutes a waiver of the privilege (Pls.' Mem. at 4-5 and n.1).

AAA's argument is unpersuasive. As explained above, invocation of the deliberative process privilege requires an affidavit or declaration from the head of the governmental agency with control of the withheld documents. It is undisputed that the Port Authority has control over the Inter-Agency Communications, and, therefore, Foye, as the Executive Director for the Port Authority, is the appropriate agency official to invoke the deliberative process privilege on the Port Authority's behalf.

AAA argues, without citation to any authorities, that Foye is the wrong individual to invoke the privilege and that affidavits must be submitted by the New York and New Jersey Governors' Offices because they received the documents (Pls.' Mem. at 5). There is no legal requirement that invocation of the deliberative process privilege requires an affidavit from every

recipient of the documents in issue. Rather, as noted above, the proper invocation of the privilege requires only an affidavit from the head of the agency with control of the documents. AAA's argument in this regard is based on a non-existent legal principle.

Accordingly, the Port Authority has properly invoked the deliberative process privilege over the Inter-Agency Communications.

2. Sufficiency of the Port Authority's Revised Privilege Log

Although AAA concedes that the revised privilege log is in compliance with my May 8 Order, it, nevertheless, contends that the Port Authority has waived the deliberative process privilege by failing to provide sufficiently descriptive information in its revised privilege log. Specifically, AAA claims that the author and recipient information is insufficiently detailed because the Port Authority has not provided "the identities, titles, and roles of the authors, recipients and those CC'ed on [the withheld] communications" (Pls.' Mem. at 7). AAA also argues that the descriptions of the categories of withheld documents are "vague" and "conclusory" (Pls.' Mem. at 10). Additionally, as to the Inter-Agency Communications, AAA claims

that the Port Authority has not provided sufficient information upon which the court can determine whether the New York and New Jersey Governors' offices were participants in the decision to raise the tolls. Finally, AAA asserts that any purely factual material in the documents must be disclosed (Pls.' Mem. at 11).

AAA appears to misunderstand my May 8 Order. In that Order, I resolved the dispute concerning the sufficiency of the Port Authority's privilege log pursuant to Fed.R.Civ.P. 26 and Local Civil Rule 26.2, i.e., whether the Port Authority's privilege log contained "sufficient information such that [AAA could] make an intelligent determination as to whether the withheld documents were 'predecisional' and 'deliberative.'" Auto. Club of N.Y., Inc. v. Port Auth. of N.Y. & N.J., supra, 297 F.R.D. at 60. As indicated on pages 4, 5 and 6 above, in my May 8 Order I found that certain aspects of the Port Authority's privilege log were sufficiently detailed, while others needed to be supplemented. AAA concedes that the Port Authority submitted a revised privilege log that complies with my May 8 Order (Pls.' Mem. at 7). Because the Port Authority's revised log complies with my May 8 Order, the issue of whether the log provides adequate information is now off the table and the only remaining question is whether the information in the revised privilege log establishes, for each category of documents, that the documents are

both pre-decisional and deliberative. Favors v. Cuomo, 285 F.R.D. 187, 221 (E.D.N.Y. 2012); Bowne of N.Y.C., Inc. v. AmBase Corp., 150 F.R.D. 465, 470 (S.D.N.Y. 1993) (Dolinger, M.J.). If AAA thought my May 8 Order did not require sufficient information, its remedy was to seek reconsideration or to file objections with Judge Eaton. Having done neither, there is no basis to revisit the issues resolved in that Order.

However, instead of arguing that the entries do not establish the elements of any privilege, AAA renews its argument that the privilege log is insufficiently detailed. For example, AAA's memorandum of law states "[a]though the Port Authority has supplemented the privilege log as directed by the Court, the definition of 'Client' is still inadequate because it is so broad that it ceases to be meaningful" (Pls.' Mem. at 7 (internal quotation marks omitted); see also Pls. Mem. at 8). AAA's memorandum of law also states that "[t]he vague and formulaic description provided by the Port Authority does not satisfy its burden of demonstrating that the privilege applies, and for that reason the withheld documents should be produced" (Pls.' Mem. at 10). Because my May 8 Order and the Port Authority's subsequent remedial steps addressed these arguments, I reject AAA's attempt to reassert them here.

I also reject AAA's argument that there is insufficient information to determine whether individuals at the New York and New Jersey Governors' offices were participants in the deliberative process leading up to the 2011 toll increases. The Port Authority states that it regularly updated officials at the New York and New Jersey Governors' offices regarding the Port Authority's activities, and the 2011 toll increases in particular (Defendant's Opposition to Plaintiffs' Motion to Compel, dated Aug. 29, 2013, (Docket Item 94) ("Def.'s Mem.") at 16, citing Bill Baroni Dep. Tr. 147:9-18, and Ex. 8 to Declaration of Alexander H. Southwell, dated Aug. 28, 2013, (Docket Item 95)). Counsel represents that the Port Authority apprised both Governors' offices of the Port Authority's planned toll increases because those offices had the power to veto any toll increases approved by the Port Authority's Commissioners (Def.'s Mem. at 16). See N.J. Stat. Ann. § 32:1-17; N.Y. Unconsol. Law § 6417; Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 37 (1994) ("The Governor of each State may veto actions of the Port Authority commissioners from that State, including actions taken as PATH directors."). Communications reflecting internal deliberations between government officials and their superiors regarding the prospective enactment of a policy are the quintessential examples of communications covered by the deliberative process

privilege. Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement Agency, 811 F. Supp. 2d 713, 756-57 (S.D.N.Y. 2011) (Scheindlin, D.J.); McNamara v. City of New York, supra, 249 F.R.D. at 81 ("[A] document may be deemed 'deliberative' not only where it explicitly weighs competing policy alternatives, but also where it contains a preliminary outline of a policy prepared by lower-ranking government officials for presentation to a superior with final policymaking authority."); Tarullo v. U.S. Dep't of Def., 170 F. Supp. 2d 271, 277-78 (D. Conn. 2001).

Finally, counsel for the Port Authority represents in its opposition brief that none of the 339 documents contain purely factual material that can be separated from deliberative analyses (Def.'s Mem. at 8 n.4). In light of counsel's representation, which AAA provides no reason to question, AAA's motion to compel the production of purely factual material in the Port Authority's privilege log is denied.

3. Balancing the Parties' Interests

A finding that a document is protected under the deliberative process privilege does not, however, end the analysis because the deliberative process privilege is not absolute.

> [T]he deliberative process [is a] qualified privilege[] and, therefore, "when the existence of [the] privilege is established, there is a need to balance

> the public interest in nondisclosure against the need of the particular litigant for access to the privileged information." United States v. United States Currency in Sum of Twenty One Thousand Nine Hundred Dollars, No. 98 Civ. 6168 (SJ), 1999 WL 993721, at *2 (E.D.N.Y. Sept. 21, 1999) (citing Friedman v. Bache Halsey Stuart Shields, 738 F.2d 1336, 1341 (D.C. Cir. 1984), and Raphael v. Aetna Cas. & Sur. Co., 744 F. Supp. 71, 74-75 (S.D.N.Y. 1990)) (additional internal citation omitted).
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> Thus, in assessing the government's assertion of privilege, "[t]he court must balance the interests favoring and disfavoring disclosure, keeping in mind that the burden of persuasion rests on the party seeking to prevent disclosure. The court must also consider the value of appropriate protective orders and redactions." King, 121 F.R.D. at 190-91; see also Kitevski v. City of New York, No. 04 Civ. 7402 (RCC)(RLE), 2006 WL 680527, at *3 (S.D.N.Y. March 16, 2006) ("Whether the showing of relevance and need rises to the requisite level is a discretionary determination that must necessarily be made on a case-by-case basis."); United States v. Sawinski, No. 00 Crim. 0499 (RPP), 2000 WL 1702032, at *3 (S.D.N.Y. Nov. 14, 2000) (citing In re Sealed Case, 856 F.2d 268, 272 (D.C. Cir. 1988)).

MacNamara v. City of N.Y., supra, 249 F.R.D. at 79-80.

> In balancing the parties' interests,
>
> [f]actors favoring disclosure include (1) the relevance of the requested materials to the [requesting party's] case, (2) the importance of the materials to the [requesting party's] case, including the availability of the information from alternative sources, (3) the strength of the [requesting party's] case . . . , and (4) the importance [of disclosure] to the public interest. Factors against disclosure include (1) threats to public safety, (2) the invasion of government officials' privacy, (3) the weakening of government programs, and (4) the chilling of internal candor.

In re MTBE Prods. Liab. Litig., supra, 643 F. Supp. 2d at 442-43; see also In re Delphi Corp. v. United States, 276 F.R.D. 81, 85-86 (S.D.N.Y. 2011) (Castel, D.J.), citing Export-Import Bank of the U.S. v. Asia Pulp & Paper Co., 232 F.R.D. 103, 109 (S.D.N.Y. 2005) (Francis, M.J).

The importance of the evidence to the plaintiffs' case, or the plaintiffs' need for the evidence, has consistently been found to be "the most important of all factors." King v. Conde, 121 F.R.D. 180, 194 (E.D.N.Y. 1988); Otterson v. Nat'l R.R. Passenger Corp., 228 F.R.D. 205, 209 (S.D.N.Y. 2005) (Kaplan, D.J.); Export-Import Bank of the U.S. v. Asia Pulp & Paper Co., supra, 232 F.R.D. at 109, citing In re Franklin Nat. Bank Secs. Litig., 478 F. Supp. 577, 580-82 (E.D.N.Y. 1979). The critical inquiry is ordinarily whether the government's deliberations, motivations, or thought process themselves are genuinely in issue in the case, and the privilege is routinely found to be inapplicable where the agency deliberations are central to the case. See, e.g., In re Delphi Corp. v. United States, supra, 276 F.R.D. at 85-86 ("Where the deliberative or decisionmaking process is the 'central issue' in the case, the need for the deliberative documents will outweigh the possibility that disclosure will inhibit future candid debate among agency decision-makers."); MacNamara v. City of New York, 04 Civ. 9612 (KMK)(JCF), 2007 WL

755401 at *10 (S.D.N.Y. Mar. 14, 2007) (Francis, M.J.) ("Accordingly, 'in a civil rights action where the deliberative process of State or local officials is itself genuinely in dispute, privileges designed to shield that process from public scrutiny must yield to the overriding public policies expressed in the civil rights laws.'" (quoting Grossman v. Schwarz, 125 F.R.D. 376, 381 (S.D.N.Y. 1989) (Wood, D.J.)); Nat. Res. Def. Council v. Fox, 94 Civ. 8424 (PKL)(HBP), 1998 WL 158671 at *5 (S.D.N.Y. Apr. 6, 1998); Dep't of Econ. Dev. v. Arthur Anderson & Co., 139 F.R.D. 295, 299 (S.D.N.Y. 1991) (Stewart, D.J.) ("Where the adjudication of fraud claims turns upon issues of [the agency's] knowledge, reliance, and causation, direct evidence of the deliberative process is irreplaceable."); Resolution Trust Corp. v. Diamond, supra, 773 F. Supp. at 605 ("[T]he considerations that RTC took into account in its deliberations are directly in issue in this case, making the contested evidence highly relevant by the very fact that it is deliberative."); Burka v. N.Y.C. Transit Auth., 110 F.R.D. 660, 667 (S.D.N.Y. 1986) (Francis, M.J.) ("Where the decision-making process itself is the subject of the litigation, the deliberative privilege may not be raised as a bar against disclosure of critical information.").

Here, AAA argues that documents in categories 17, 18, 19 and 20 should be produced because the "reasons for the toll

increases, and the deliberations and the decision of the Port Authority Commissioners to approve the toll increases, are cental to [its] case" (Pls.' Mem. at 12-13).

I conclude that AAA's claims under the dormant Commerce Clause and the Highway Act do not turn on the Port Authority Commissioners' internal deliberations or motivations and that AAA's interests do not, therefore, outweigh the interests protected by the deliberative process privilege.

In Northwest Airlines, Inc. v. Cnty. of Kent, 510 U.S. 355, 369 (1994), the Supreme Court held that the constitutionality of a fee charged for the use of state facilities is evaluated by a three-part test, which asks whether the fee "(1) is based on some fair approximation of use of the facilities, (2) is not excessive in relation to the benefits conferred, and (3) does not discriminate against interstate commerce." Here, AAA alleges that the 2011 toll increases fail under parts (1) and (2) of the test. Auto. Club of N.Y., Inc. v. Port Auth. of N.Y. & N.J., supra, 842 F. Supp. 2d at 677.[4]

The law of this Circuit following Northwest Airlines demonstrates, however, that fair approximation and excessiveness

[4]The parties agree that the three-part test in Northwest Airlines applies. Auto. Club of N.Y., Inc. v. Port Auth. of N.Y. & N.J., supra, 842 F. Supp. 2d at 677.

are evaluated by objective factors -- how a toll operates in practice -- and not the internally stated reasons for its enactment. In Selevan v. N.Y. Thruway Auth., 711 F.3d 253 (2d Cir. 2013) (per curiam), for example, the Second Circuit considered whether the New York Thruway Authority's policy to give a special toll discount to residents of Grand Island, New York was constitutional under Northwest Airlines. In assessing whether the toll discount was a fair approximation of the use of the bridge, the Selevan Court concluded that the relevant inquiry is whether "each user, on the whole, pays some approximation of his or her fair share of maintaining the bridge." Selevan v. N.Y. Thruway Auth., supra, 711 F.3d at 259. The Court found that the toll discount met the fair approximation prong by comparing the use of the bridge by Grand Island residents and non-residents with the tolls rates residents and non-residents were required to pay. Similarly, in finding that the toll discount was not excessive in relation to the benefits conferred, the Court compared the Authority's revenues from the toll with its operating and capital expenses. Selevan v. N.Y. Thruway Auth., supra, 711 F.3d at 260. Significantly, the Selevan Court did not consider the Authority's motivations for enacting the toll policy or its internal deliberations in assessing prongs (1) and (2) of the Northwest Airlines test.

Other decisions in this Circuit and elsewhere have utilized the same objective approach and have not considered either the intent of the decision makers or the process by which the decision makers made their determination. See, e.g., Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Auth., 567 F.3d 79, 86-88 (2d Cir. 2009); Janes v. Triborough Bridge & Tunnel Auth., --- F. Supp. 2d ---, ---, 06 Civ. 1427 (PAE), 2013 WL 5630629 at *18-*20 (S.D.N.Y. Oct. 16, 2013) (Engelmayer, D.J.); Cohen v. R.I. Turnpike & Bridge Auth., 775 F. Supp. 2d 439, 448-50 (D.R.I. 2011); see also Northwest Airlines, Inc. v. Cnty. of Kent, supra, 510 U.S. at 369-72.

The fact that AAA has also asserted a claim under the Highway Act, 33 U.S.C. § 508, does not change the result. The prevailing standard, whether a toll increase is "just and reasonable," turns on whether proceeds from a particular toll increase are allocated to fund projects within the Port Authority's ITN. Auto. Club of N.Y., Inc. v. Port Auth. of N.Y. & N.J., 887 F.2d 417, 423 (2d Cir. 1989). Since this question may be answered by a reviewing the Port Authority's revenues and expenditures, the internal deliberations of the Port Authority Commissioners are not central to AAA's Highway Act claim either.

Accordingly, because AAA's claims pursuant to the dormant Commerce Clause and the Highway Act do not turn on the

internal deliberations of the Port Authority Commissioners, I conclude that AAA's interest in disclosure is not sufficient to outweigh the interests protected by the deliberative process privilege.

C. In Camera Review

Finally, AAA requests that I conduct an in camera review of the 339 withheld documents. AAA contends that an in camera review is particularly appropriate here, where the privilege log and declaration contain insufficient information to assess whether the deliberative process privilege is applicable.

"In camera review is considered the exception, not the rule, and the propriety of such review is a matter entrusted to the district court's discretion." Local 3, Int'l Bd. of Elec. Workers v. NLRB, 845 F.2d 1177, 1180 (2d Cir. 1988), citing Donovan v. F.B.I., 806 F.2d 55, 59 (2d Cir. 1986), abrogated on other grounds, U.S. Dep't of Justice v. Landano, 508 U.S. 165 (1993). I decline to conduct an in camera review here principally because AAA has failed to make specific challenges to individual entries in the Port Authority's privilege log. The information in the Port Authority's privilege log provides AAA with more than enough information to make challenges to individual categories of documents, but AAA has declined to do so. In

the absence of argument from the parties directed to specific documents, in camera review would require me to parse through the documents and guess what arguments AAA would or could make in support of production and what arguments the Port Authority would or could make in opposition to production. I decline to engage in such a speculative undertaking. Accordingly, AAA's request for in camera review is denied. Accord In re Delphi Corp., supra, 276 F.R.D. at 87; see also Kalwasinski v. Fed. Bureau of Prisons, 08 Civ. 9593 (PAC)(MHD), 2010 WL 2541363 at *10 n.12 (S.D.N.Y. Mar. 12, 2010) (Dolinger, M.J.) (Report & Recommendation), adopted at, 2010 WL 2541159 (S.D.N.Y. June 23, 2010).

IV. Conclusion

Accordingly, for all the foregoing reasons, AAA's motion to compel (Docket Item 91) is denied in its entirety.

Dated: New York, New York
June 4, 2014

SO ORDERED

HENRY PITMAN
United States Magistrate Judge

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